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No. 80-2183

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN D. WILSON,

Respondent,

vs.

DAVID J. CLARK, M.D.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Whether the Illinois Supreme Court denied petitioner due process of law under the fourteenth amendment to the United States Constitution when it approved in principle the expert medical opinion originally elicited by petitioner in the trial court based in part on hospital records not testified to by way of foundation by those who made each entry so far as to permit precisely the same testimony in a retrial between these same parties, but refused to give retroactive effect to the prior use of such testimony so as to sustain the verdict and judgment in favor of petitioner in the trial court.

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OPINIONS BELOW

The opinion of the Illinois Supreme Court in this case is reported at ..... Ill. 2d ....., 417 N.E. 2d 1322. The opinion of the Illinois Appellate Court, Second District is found at 80 Ill. App. 3d 194, 399 N.E. 2d 651. Both opinions are set forth in full in the Appendix hereto.

JURISDICTION

Date Of Entry Of Judgment

On February 3, 1981, the Illinois Supreme Court entered its judgment affirming the judgment of the Illinois Appellate Court, Second District which, in turn, reversed the jury verdict and judgment of not guilty for petitioner herein in the trial court and remanded the cause for new trial.

Date Of Order Denying A Rehearing

On March 27, 1981, the Illinois Supreme Court denied a petition for rehearing, but modified the opinion somewhat as to the extent of the retroactive effect of its original ruling. The text of this order is also found in the Appendix at page 10a.

Statutory Basis Of Jurisdiction Of This Court

United States Supreme Court Rule 17.

CONSTITUTION AND STATUTES INVOLVED

Fourteenth Amendment, United States Supreme Court, U.S.C.A., Const., Amendment 14, pp. 3, 4.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property without due process* of law; nor deny to any person the equal protection of the laws. (Emphasis ours)

Illinois Revised Statutes, Ch. 110A, Sec. 236.

(a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term "business," as used in this rule, includes business, profession, occupation, and calling of every kind.

(b) This rule does not apply to the introduction into evidence of medical records or police accident reports.

STATEMENT OF THE CASE

Plaintiff sued petitioner, Dr. David J. Clark, M.D., in a suit based on allegations of medical malpractice in treatment of a leg fracture and complications arising from infection and nonunion of the bone. A jury verdict of not guilty resulted at the trial.

On appeal to the Illinois Appellate Court, Second District, the respondent, appellant therein, raised numerous allegations of error. The Illinois Appellate Court did not rule on most of those alleged errors but decided that three of those allegations of error were well founded, set aside the favorable verdict, reversed the judgment for petitioner, and remanded the cause for new trial. One of the three bases for its decision was expert medical opinion testimony given by a physician witness for petitioner, over respondent's attorney's objection, based in part on hospital records of the respondent. Respondent's attorney first objected to a question by petitioner's attorney seeking the opinion of this witness after the witness was asked if he had reviewed, among other records, the hospital records of respondent. The objection was based on the fact that the hospital records were not in evidence, even though the records had been stipulated to be authentic and the respondent himself had obtained admission of large portions of those same records including individual x-rays report entries, lab reports, etc., by way of copies in the office records of the petitioner, David J. Clark, M.D. Petitioner then offered the complete hospital records into evidence, whereupon respondent objected again, this time citing Illinois Supreme Court Rule 236(b) which prohibits the application of the shopbook rule (re records kept in the ordinary course of business) to admit hospital records ab-

sent foundation testimony by each person who made an entry thereon that he in fact made each entry. The records were admitted, but, very significantly, *were ordered not to be shown to the jury.* Thus, the "admission" of the hospital records was really only an identification of the hospital records for purpose of the record in this case. This so-called "admission" was held to be prejudicial error by the Illinois Appellate Court.

On review, the Illinois Supreme Court considered all the allegations of error raised in the Illinois Appellate Court, both those ruled on below and those not deemed necessary below to the Appellate Court's decision and held that all allegations of error were unfounded except that involving the "admission" of the hospital records and the expert testimony based thereon. Significantly, the Illinois Supreme Court agreed with petitioner that an expert medical witness' opinion may be based on medical records *even if those records are not admitted into evidence at all,* subject only to cross-examination as to the basis of the opinion. However, the Illinois Supreme Court held that respondent was justified below in relying on Illinois Supreme Court Rule 236(b) to exclude the hospital records (which it had already held did not have to be admitted in our case and which, again, were never seen by the jury).

The Illinois Supreme Court even said that the same expert opinion could be elicited in a *retrial of this cause,* but that otherwise such opinions could be sought without foundation medical evidence only in cases filed on or after the date of its opinion. On rehearing, the Court modified its opinion to also permit such testimony in cases which go to trial on or after September 1, 1981.

In its petition for rehearing in this cause, after the grounds on which relief is sought herein were first

revealed in the Illinois Supreme Court's opinion, petitioner challenged the fundamental fairness (a historic basis of due process under the fourteenth amendment to the United States Constitution) of the action of that court in approving what petitioner had done below and authorizing him *to do it again*, but incredibly *denying* him the prior effect thereof (his property right to a fairly won exoneration) and unfairly subjecting him to a new trial and unnecessary exposure to the risk of an adverse money judgment. No specific ruling was made other than denial of the petition.

ARGUMENT

The following general principles as to requirements of federal due process apply.

This Court has held that the application of rules in relation to whether or not a decision of an appellate court will be applied retroactively must be considered in light of the totality of the circumstances as to the effect on other constitutional rights, including the right to due process. *Brinkerhoff v. Faris Trust & Sav. Co.*, 281 U.S. 673, 74 L.Ed. 1107, 50 S. Ct. 451.

State decisions as to due process of law must be controlled by decisions of the federal courts, *Pembleton v. Illinois Commercial Men's Assoc.*, 289 Ill. 99, 124 N.E. 355. A fair trial is a basic requirement of due process. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 49 L. Ed. 2d 683, 96 S. Ct. 2791.

This Court has held that due process is not confined within a permanent definition of what may at a given time be deemed the essential limits of fundamental rights. *Frank v. Maryland*, 359 U.S. 360, 3 L. Ed. 2d 877, 79 S. Ct. 804, reh. den. 360 U.S. 914, 3 L. Ed. 2d 1263, 79 S. Ct. 1292. Its exact boundaries are indefinable and its content varies according to specific facts. *Hannah v. Larche*, 363 U.S. 420, 4 L. Ed. 2d 1307, 80 S. Ct. 1502, Reh. den. 364 U.S. 855, 5 L. Ed. 2d 79, 815 S. Ct. 33.

Due process has to do with the denial of fundamental fairness. *Kinsella v. United States*, 361 U.S. 234, 4 L. Ed. 2d 268, 80 S. Ct. 297. (Emphasis ours) Procedural due process has never been of fixed and invariable content. *Federal Communications Com. v. W.J.R. Goodwill*

Station, Inc., 337 U.S. 265, 93 L. Ed. 1353, 99 S. Ct. 1097. Again, the propriety of the deprivation of property must be resolved in a manner consistent with *fundamental fairness. Hannah v. Larche*, 363 U.S. 420, 4 L. Ed. 2d 1307, 80 S. Ct. 1502, reh. den. 364 U.S. 855, 5 L. Ed. 2d 78, 81 S. Ct. 33. Whether the trial is in Federal or State courts, the concern of due process is with the fair administration of justice. *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L. Ed. 2d 532, 91 S. Ct. 499.

What state procedures are fair depends, in part, on the particular situation presented. *Spevack v. Klein*, 385 U.S. 511, 17 L. Ed. 2d 574, 87 S. Ct. 625.

The application to the petitioner of the Illinois Supreme Court's opinion below raises unique and unprecedented due process issues. We are not merely involved with issues respecting propriety of retroactive or prospective application of the rules announced in the Illinois Supreme Court's opinion. We are concerned with more fundamental due process issues arising from the peculiar facts of our case, wherein petitioner's prior actions in presenting evidence have been approved by the opinion of the Illinois Supreme Court but denied their legitimate prior effect (the prior fairly won verdict) because of the endorsement by that Court of a specious claimed "reliance" on a prior rule of evidence, the discarding of which was expressly not deemed by the Court to be essential to implementation of the new rule announced and which prior rule was never legitimately the subject of prejudicial reliance below.

It is submitted that plaintiff introduced substantial portions of the hospital records made by numerous individual persons without himself supplying foundation testimony similar to that upon which he later based his entire appeal. He thus invited similar action. An objec-

tion that the entire hospital records lacked the foundation testimony he himself did not deem necessary is an unfair basis for reversal. Further, the hospital records *never went to the jury* by court order and their "admission" (really only an identification and inclusion in the record) can in no way be prejudicial, prejudice being a necessary requirement for reversal of an otherwise fairly won jury verdict.

Finally, the Illinois Supreme Court's ruling states that the opinion given herein by our expert may again, on retrial, be elicited, this time without requiring admission of the hospital records and without foundation testimony as to the records upon which the opinion was previously partly based, but that retroactive effect will be denied since respondent supposedly was previously justified in relying on a rule (Illinois Supreme Court Rule 236(b)) excluding such records from admission in evidence without foundation testimony of each entrant. The endorsement of the procedure with denial of its prior effect is the clear denial of a fairly won verdict.

Please note that admission of records is deemed not required by the Illinois Supreme Court opinion for future expert testimony based on such records. Note again, also that the records *never were exposed to the trier of fact* in the prior trial. To require this petitioner to re-expose himself to possible deprivation of his property after prior exoneration using a method now confirmed to have been proper is, under these circumstances, a fundamentally unfair deprivation of his property by all reasonable definitions of due process under the Federal constitution. Reinstatement of the prior verdict and judgment is demanded by all reason and logic.

CONCLUSION

For the reasons given, this petition should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Illinois
(Dated February 3, 1981—Modified March 27, 1981)

JOHN D. WILSON,

Appellee,

No. 53153 *v.*

DAVID J. CLARK,

Appellant.

MR. JUSTICE MORAN delivered the opinion of the court:

In the circuit court of Kane County, plaintiff, John Wilson, brought an action against defendant, Dr. David Clark, following the alleged negligent medical treatment of the plaintiff which resulted in the amputation of his right leg below the knee. Following a jury trial, a verdict was returned for the defendant. On appeal, the appellate court was presented 10 issues for review. The court considered three of these issues and reversed the trial court. (80 Ill. App. 3d 194.) It held that no foundation was established for the admission of hospital records into evidence and that a hypothetical question based upon these records should not have been allowed. The appellate court also found that the trial court had allowed incompetent and prejudicial testimony to be admitted on the issue of contributory negligence and that such admission constituted reversible error.

Although plaintiff has again raised 10 issues, we find it necessary to address only those where objections were specifically raised in the post-trial motion.

Plaintiff argues that his claim that the trial court erroneously permitted admission of incompetent and prejudicial testimony on the issue of contributory negligence was raised with sufficient specificity in his post-trial motion. The two allegations of this error, as set forth in the post-trial motion, stated:

> "21. The Court was in error in allowing witnesses to answer questions on irrelevant, immaterial and prejudicial matters.
>
> 22. The Court was in error in admitting improper, irrelevant, immaterial and/or prejudicial evidence."

The appellate court indicated that because plaintiff objected to the error during trial, he did not have to specifically raise the same error in the post-trial motion.

Prevailing statutory and case authority in Illinois is contrary to the appellate court's position. (Ill. Rev. Stat. 1977, ch. 110, par. 68.1(2); 73 Ill. 2d R. 366(b)(2)(iii); *Brown v. Decatur Memorial Hospital* (Dec. 1, 1980), No. 52517; *Bank of Marion v. Robert "Chick" Fritz, Inc.* (1974), 57 Ill. 2d 120, 127; *Nelson v. Union Wire Rope Corp.* (1964), 31 Ill. 2d 69, 114.) These authorities hold that post-trial motions must contain specific allegations of error relied on for relief. The allegations here do not set forth a succinct statement of the factual basis upon which plaintiff's conclusions are drawn. (*Brown v. Decatur Memorial Hospital* (Dec. 1, 1980), No. 52517, slip op. at 4)), and the claimed error has not been properly preserved for review.

Plaintiff next contends he should have been awarded a judgment notwithstanding the verdict. According to the often-cited *Pedrick* standard, a party is entitled to a judgment *n.o.v.* "only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever

stand." (*Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill. 2d 494, 510.) Plaintiff presented evidence that defendant failed to treat a "known infecting organism." He maintains that this, in and of itself, requires a judgment in his favor. On the other hand, the evidence reveals several points supporting defendant's contention that his treatment was not improper. Defendant testified that he was attempting to stop the more aggressive or virulent bacteria such as staphylococci. The defendant also testified that pseudomonas is always present in plaintiff's skin and is an organism that is easily killed off by a healthy blood supply. In addition, the defendant found support in plaintiff's own expert witness, Dr. Robbins, who amputated plaintiff's leg. Dr. Robbins testified that the infection could have been arrested and cured if plaintiff had checked into the hospital on October 1, 1974. Thus, this testimony raises a question as to the proximate cause of plaintiff's injury. Further, Dr. Nyman's testimony that defendant's treatment met the standard in effect in Kane County could serve as a proper basis for a jury's verdict in favor of the defendant. Based upon these facts, the trial court did not err in failing to enter a judgment *n.o.v.*

We find that the trial court was not in error by instructing the jury on the issue of contributory negligence. The record reveals several actions by plaintiff that the jury could have concluded contributed to the nonunion and the ultimate amputation. Therefore, on the evidence admitted, the jury was properly instructed as to plaintiff's contributory negligence.

Plaintiff claims that the court committed prejudicial error in limiting his redirect examination of Dr. Robbins. However, we find the record shows that the plaintiff was allowed to subsequently bring out on redirect examination the matters about which he objects.

Plaintiff also alleges that the jury should have been given an instruction on wilful and wanton conduct. He asserts that failure to treat the pseudomonas after the first culture was negligence, but failure to treat it after several examinations constituted wilful and wanton conduct. We disagree. As already indicated, the testimony of defendant, of Dr. Nyman, and of plaintiff's expert, Dr. Robbins, indicated that defendant's treatment may have been proper. This court has defined a wilful and wanton act as one that intentionally causes injury or one committed under circumstances exhibiting a reckless disregard for the safety of others. (*E.g., Hocking v. Rehnquist* (1969), 44 Ill. 2d 196, 201.) Inasmuch as the evidence in this case presents the possibility that defendant's treatment may have been proper, there is nothing in the record to indicate that defendant intentionally caused plaintiff's injury, or that he acted in reckless disregard for plaintiff's safety. Consequently, it cannot be said that the trial court erred in failing to give the jury an instruction on wilful and wanton conduct.

We next consider plaintiff's argument that the trial court erred in allowing his hospital records to be admitted into evidence without proper foundation, and in permitting a hypothetical question based on those records.

Plaintiff argues that two procedural steps are necessary to enter hospital records into evidence. The first step is for the custodian of the records to verify that the records were kept in the ordinary course of business and are in the same condition as when the entries were originally made. Plaintiff admits that he waived this requirement.

The second step is verification of the records by the testimony of the person who made the entries. Plaintiff did not waive this requirement. Over plaintiff's objection, the trial court, nevertheless, permitted defense

counsel to place in evidence plaintiff's hospital records, which contained 100 pages of technical medical entries, including history sheets, temperature charts, medication charts, laboratory reports, administration sheets, X-ray reports, progress reports, pathology reports, post-anesthesia reports, physician orders and nurses' notes.

After the hospital records were placed in evidence, defense counsel was permitted to tell defendant's expert witness, Dr. Nyman, to assume the facts stated in the hospital records to be true and to further assume additional facts regarding plaintiff's treatment. Upon this foundation, defense counsel was then allowed to ask Dr. Nyman to give his opinion of whether the "hypothetical" Dr. Clark exercised the degree of knowledge and expertise expected of a board-certified orthopedic surgeon in Kane County.

Supreme Court Rule 236(a) (73 Ill. 2d R. 236(a)) provides that a business record shall be admitted into evidence without introducing all circumstances of its making. Under Rule 236(b), hospital records and police accident reports are excepted from subsection (a). Consequently, a proper foundation is needed before hospital records will be admitted into evidence.

The hospital records in this case were admitted into evidence without a proper foundation. However, we believe it is unnecessary for hospital records to be admitted in order to elicit an expert medical opinion. This court, in *People v. Ward* (1975), 61 Ill. 2d 559, 566-67, held that medical records may be used by an expert witness in forming an opinion as to an accused's sanity even though the reports are not admitted into evidence. Although *Ward* involved a treating doctor giving an opinion, we believe that Federal Rule of Evidence 703, upon whose rationale the case relied, makes no distinction between the opinions of treating and nontreating doctors. The rule states:

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Fed. R. Evid. 703.

Both Federal and State courts have interpreted Federal Rule 703 to allow opinions based on facts not in evidence. (*United States v. Genser* (3d Cir. 1978), 582 F.2d 292, 298; *Bryan v. John Bean Division of FMC Corp.* (5th Cir. 1978), 566 F.2d 541, 545; *United States v. Sims* (9th Cir. 1975), 514 F.2d 147, 149; *State v. Pendry* (1976), ... W. Va. ....., ..., 227 S.E.2d 210, 215.) None of these cases makes a distinction between treating and nontreating experts. According to these cases, the key element in applying Federal Rule 703 is whether the information upon which the expert bases his opinion is of a type that is reliable.

In addition, the advisory committee's note to Federal Rule 703 makes it clear that the rule applies to expert opinions based on firsthand observation, hypothetical questions, or presentation of data outside the court. The note provides:

> "Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. *** The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. *** The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his

> own perception. ***" Fed. R. Evid. 703, Advisory Committee Note.

According to the note, allowing expert opinions based on facts not in evidence dispenses with "the expenditure of substantial time in producing and examining various authenticating witnesses. *** [The physician's] validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes." Fed. R. Evid. 703, Advisory Committee Note. See also McCormick, Evidence sec. 15, at 36 (2d ed. 1972); Weinstein, Evidence par. 703[02] (1978).

Generally it is extremely time consuming to call into court every person who made an entry in the hospital records. We hold that, in the future, as later stated, due to the high degree of reliability of hospital records, an expert may give his response to a hypothetical question based on facts contained in those records, even if the hospital records themselves are not in evidence.

Further, in following the modern trend under Federal Rule 705, an expert may give an opinion without disclosing the facts underlying that opinion. The rule states:

> "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." Fed. R. Evid. 705.

Under Rule 705 the burden is placed upon the adverse party during cross-examination to elicit the facts underlying the expert opinion. (*Bryan v. John Bean Division of FMC Corp.* (5th Cir. 1978), 566 F.2d 541, 545.) The advisory committee's note to Rule 705 allows an expert opinion without disclosure of underlying facts

whether the opinion is based on firsthand or secondhand information. In light of Illinois' extensive pretrial discovery procedures, this does not place an undue burden on the cross-examining party.

This court's following of Federal Rules 703 and 705 comports with the modern trend liberalizing certain trial procedures. Eighteen States (Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Maine, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Washington, Wisconsin, and Wyoming) have adopted Federal Rule 703 verbatim, or with minor changes. California has adopted a similar provision. Seventeen States (Alaska, Arizona, Arkansas, Colorado, Florida, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Washington, Wisconsin, and Wyoming) have adopted Federal Rule 705 verbatim, or with minor changes. In addition, California, Kansas and New Jersey have adopted similar provisions. Adoption of these two rules eliminates the time-consuming process of posing long hypothetical questions that afford an opportunity to sum up or reiterate the evidence in the middle of a case.

Although we hold that the trial procedures embodied in Federal Rules 703 and 705 should be followed, we believe it would be unfair to hold them applicable to the plaintiff in the instant case. Under Supreme Court Rule 236(b), the trial court erred in allowing the hospital records in evidence without a proper foundation. Under the law in effect at the time of trial, plaintiff had no notice that Dr. Nyman's (a nontreating expert's) opinion in response to a hypothetical question could be based on records not in evidence. Plaintiff's conduct of objecting to the admission of the hospital records, rather than cross-examining defendant's expert as to the facts util-

ized in forming his opinion, was reasonable. Plaintiff did not have to risk waiving his sound objection to the records, or expose the jury to information in the records he hoped to exclude, by cross-examining defendant's expert. In the context of this case, we hold that allowance of a hypothetical question based on hospital records improperly admitted into evidence constituted reversible error.

In conclusion, we adopt Federal Rules of Evidence 703 and 705, but because this opinion represents a change in Illinois law, we hold that, except as to the parties herein, to which this change shall apply in the retrial, the law of this case shall apply only to cases in which the initial complaints are filed on and after the date of this opinion, [or in which trial commences on or after September 1, 1981.]* *Stevens v. Silver Manufacturing Co.* (1977), 70 Ill. 2d 41, 46; *Renslow v. Mennonite Hospital* (1977), 67 Ill. 2d 348, 359; *Molitor v. Kaneland Community Unit District No. 302* (1959), 18 Ill. 2d 11, 26-27.

For the above-stated reasons, the decision of the appellate court is affirmed and the cause is remanded to the trial court for a new trial.

Affirmed and remanded.

* The language in brackets was added by the Supreme Court of Illinois in a modified opinion on March 27, 1981 after petition for rehearing, which was denied.

APPENDIX B

Order of the Supreme Court of Illinois Denying Rehearing (Dated March 27, 1981)

To: (Attorneys of Record)

No. 53153

The Supreme Court today denied the petition for rehearing in the above entitled cause and modified the last page of the opinion. A copy of such page as modified is enclosed.

Mr. Justice Simon took no part.

Signed
/s/ CLELL L. WOODS,
Clerk of the Supreme Court

APPENDIX C

Opinion of the Appellate Court of Illinois

JOHN D. WILSON,

Plaintiff-Appellant,

No. 78-248 *v.*

DAVID J. CLARK,

Defendant-Appellant.

Mr. JUSTICE WOODWARD delivered the opinion of the court:

Plaintiff, John Wilson, brought this action against the defendant, Dr. David Clark, as the result of the alleged negligent medical treatment of the plaintiff which resulted in the amputation of his right leg below the knee. Following a jury trial, a verdict was returned for defendant, and plaintiff appeals. Due to the errors committed at trial, we reverse and remand for a new trial. A statement of the pertinent facts follows.

On January 8, 1972, the 20 year old plaintiff was struck by a car and suffered injuries to his right leg, mainly, a spiral fracture of the tibia (the "shin bone") and two fractures of the fibula (the thinner bone running parallel to the shin bone). The fracture to the tibia was a short oblique fracture, a type which tends to be unstable, i.e. one that cannot be maintained in a correct position after several attempts to reduce or set it. Two days after the injury, defendant performed a surgical

procedure known as an "open reduction" on plaintiff's right leg and inserted a single screw into the fracture site. There is a recognized percentage of infection complication when an open reduction is done. Following his release from the hospital in late January, 1972, plaintiff suffered from diarrhea and fever, experienced weight loss, and the surgical wound drained pus. On February 24, 1972, plaintiff was seen by Dr. Arthur Abbott, an associate of the defendant. Dr. Abbott's notes indicated that he examined plaintiff and "wondered about the possibility of an osteomyelitis", an infection of the bone marrow by bacteria such as pseudomonas. However, defendant assured Dr. Abbott that plaintiff did not have osteomyelitis. Plaintiff was in a cast until June, 1972, when he went back to work.

A second operation was performed on plaintiff's leg by defendant on December 6, 1972, due to the malunion of the tibia. Prior to the second operation plaintiff's right leg was badly bowed to the outside, the calf was large and swollen. Plaintiff could not manipulate his right foot well and walked with a bad limp. In the second operation, defendant performed an osteotomy on plaintiff's right leg in which he inserted an "AO plate" with four screws over the fracture site to hold the reduction. Following this surgery, pus continued to drain from the front part of the leg. In a third operation, performed June 2, 1973, the plate and screws were removed. The plate and screws were tested and "chronic inflammatory cells" and "sequestrum" (broken down bone) were found. There was testimony that the latter finding was infection or osteomyelitis from the pseudomonas bacterium. However, according to defendant, the "inflammatory cells" were a non-specific finding and not osteomyelitis. Plaintiff last saw defendant on January 14, 1974; the wound was still draining.

Plaintiff then went to Dr. Jack Robbins who operated on plaintiff on April 18, 1974, and inserted Steinmann pins into the fracture site and placed the leg in a cast. A culture test of the tissue removed during this surgery showed pseudomonas, and plaintiff was placed on antibiotics and discharged from the hospital. The Steinmann pins were drawn out on July 2, 1974, and plaintiff's leg recasted. Plaintiff's cast was removed on October 8, 1974, and a splint was applied which allowed movement. At this time no infection appeared, nor was plaintiff on any antibiotics. Plaintiff was admitted to the hospital on December 1, 1974, with inflammation; his right leg was amputated below the knee on December 8, 1974. Tissue and bone from the amputation was tested and "chronic" and "acute" inflammation was found in the fracture site. Thereafter, plaintiff commenced this lawsuit.

Plaintiff has presented ten issues for review on appeal. Due to our disposition of this case, only three of them will be discussed.

We turn first to the errors alleged regarding the admission of plaintiff's hospital records into evidence. Previous to defendant calling his expert witness, Dr. Clifford Nyman, to testify, there was a discussion outside the presence of the jury concerning the propriety of the hypothetical question that was intended to be propounded to Dr. Nyman. Over plaintiff's objection, the trial court permitted defense counsel to place into evidence plaintiff's hospital records, which contained a multitude of pages of technical medical entries, including history sheets, laboratory reports, temperature charts, medication, administration sheets, X-ray reports, progress reports, pathology reports, post-anesthesia reports, physicial orders and nurses' notes. Defense

counsel was then permitted to ask Dr. Nyman to assume the facts stated therein to be true and then to ask the witness to assume additional facts. Plaintiff objected to the hypothetical question on two grounds, namely, (1) that the hospital records were inadmissible without the proper foundation, and (2) that plaintiff would have no idea upon which facts contained in the hospital records defendant's expert witness based his opinion, since there had been no evidence as to the content of the records, and as a consequence it would be impossible to cross-examine the expert upon the facts he relied.

Supreme Court Rule 236(a) (Ill. Rev. Stat. 1977, ch. 110A, par. 236(a)) provides that a business record which qualified under the Rule shall be admitted into evidence without introducing all other circumstances of its making. Under the rule, such circumstances merely affect its weight, not its admissibility. However, the provisions of this rule do not apply to the introduction into evidence of hospital records or police accident reports. (See Ill. Rev. Stat. 1977, ch. 110A, par. 236(b).) It has been held, therefore, that the admission of hospital records will be allowed only where a proper foundation is laid. (*Casey v. Penn* (1977), 45 Ill. App. 3d 573, 360 N.E. 2d 93.) The proper foundation is laid by the testimony of the person who made the entries in the hospital records. (*Slater v. Missionary Sisters of the Sacred Heart* (1974), 20 Ill. App. 3d 464, 314 N.E. 2d 715.) As there was no testimony by the person making the entries, the admission of the hospital records here was error. Further, allowing such a hypothetical question based upon the unspecified contents of the plaintiff's hospital records not only hampered plaintiff's cross-examination of defendant's expert witness, but permitted purely argumentative material rather than statements of assumed facts from which an expert can form an opinion, to be placed

before the jury. (Compare *Borowski v. Von Solbrig* (1975), 60 Ill. 2d 418, 328 N.E. 2d 301.) Therefore, upon retrial of this case, the use of such a hypothetical question should not be permitted.

However, defendant urges that plaintiff's attorney stipulated to the authenticity of these records and thus has waived the necessity for a foundation. Indeed, that appears to be the reason the trial court overruled plaintiff's objection to their admission, and allowed them into evidence. Plaintiff's attorney argues that by stipulating to the authenticity he merely waived the right to demand that the custodian of the records come to court to testify that: (1) he had received a subpoena to bring the records to court; (2) that the records are kept in the regular course of the hospital business; (3) that the records contain no alterations or deletions; and (4) are in the same condition now as when the entries were originally made. However, there is no indication of a waiver of the requirement of the testimony of the person who actually made the entries necessary for the establishment of the proper foundation. We conclude therefore, that plaintiff did not waive the necessity of establishing a foundation for the admission of the hospital records, and that the trial court erred in admitting them into evidence.

Next, we turn to the allegation of error regarding the use of a medical textbook at trial. During direct examination of defendant by his counsel, the following colloquy occurred:

> "Q. Did you hear yesterday when Dr. Khedroo (one of plaintiff's experts) said it was accepted medical treatment to put the screw perpendicular to the fracture line?
>
> A. He said the proper treatment was to—to be perpendicular to the line of the fracture not perpen-

dicular to the axis of the bone. In fact, the correct answer is the opposite of what Dr. Khedroo said and in my view it was placed in proper fashion.

Q. There is even a picture in the old addition of Campbell's showing it just like this on Exhibit 19, isn't there?

Plaintiff's Counsel: Are we referring to—

The Witness: There is,

Plaintiff's Counsel: Are you referring to Campbell's now on direct examination? It's highly improper. It just—it's only to be used on cross-examination.

The Court: He—

Defense Counsel: What if it goes—

The Court: The door is open, he may use it. The answer may stand."

Plaintiff argues that the Campbell's *Operative Orthopedics* referred to in the above colloquy is an earlier edition of the same text that was admitted as authoritative, and that the earlier edition should not have been utilized without first establishing its authoritativeness. (See *Darling v. Charleston Community Memorial Hospital* (1965), 33 Ill. 2d 326, 211 N.E. 2d 253.) However, plaintiff failed to object to the use of the earlier text at trial. Plaintiff further arges that the use of such a text is limited to use on cross-examination. *Lawson v. G. D. Searle & Company* (1975), 29 Ill. App. 3d 670, 331 N.E. 2d 75, reversed on other grounds. 64 Ill. 2d 543, 356 N.E. 2d 779.

Defendant, on the other hand, contends that these allegations of error were not designated with the required specificity in plaintiff's post-trial motion to preserve the issue for appeal. (See *Enloe v. Kirkwood* (1970), 120 Ill. App. 2d 117, 256 N.E. 2d 459.) A post-trial motion need not specify errors in detail, however, the motion must nonetheless indicate the grounds upon which the litigant relies with sufficient particularity to

afford the trial judge the identity of the error relied upon. (*Danielson v. Elgin Salvage and Supply Company* (1972), 4 Ill. App. 3d 445, 280 N.E. 2d 778.) In *Richmond Chemical Company v. Lowenthal* (1958), 16 Ill. App. 2d 568, 572, 149 N.E. 2d 352, 354, the court stated:

> "The provision was designed to require parties in their post-trial motion to specifically set forth the ground or grounds upon which the motion was based. Its purpose was to prevent the moving party from hiding behind a general objection in the trial court and for the first time raising with particularity in the Appellate Court an objection that had not been argued before the trial judge."

Assuming, arguendo, that the post-trial motion did not designate this error with required specificity, a review of the colloquy quoted above reveals that plaintiff specifically objected to the use of the Campbell text on direct examination. The trial court was aware of the specific basis for the objection and therefore plaintiff has not waived the issue on appeal. On the basis of the foregoing discussion, we hold that the trial court erred in permitting the use of the Campbell text on direct examination.

Next, we turn to the allegation that the trial court erred by permitting incompetent and prejudicial testimony on the issue of contributory negligence. Plaintiff has cited several instances wherein this alleged error occurred. However, deciding the case as we do, we need discuss only one of them. During cross-examination of plaintiff by defense counsel, the following colloquy took place:

> "Q. Did you at the same time that you saw him the next day also tell Dr. Clark (defendant) that you had been drinking at this picnic?
>
> Plaintiff's Counsel: Objection, if the Court please.

The Court: He may answer.
The Witness: Yes, I had a couple of beers.
Plaintiff's Counsel: I move it be stricken, Your Honor. It's irrelevant and immaterial.
The Court: I have already ruled the answer may stand."

Again, with regard to this allegation of error defendant argues that plaintiff had completely failed to specify any such claimed error in his post-trial motion and has thus waived it. However, we conclude on the basis of our reasoning set forth earlier in this opinion that plaintiff has not waived the presentation of this alleged error.

It is clear from the record that defendant's main defense was founded in plaintiff's alleged contribution to his own amputation. Thus, it appears that the colloquy quoted above went to the issue of contributory negligence, namely, that plaintiff was not "following" defendant's post-operative instructions, or that plaintiff was simply unmindful of already unsteady maneuvering with his crutches. We note that previously on direct examination concerning a fall in a parking lot, plaintiff had testified that he had had something to drink. However, this incident was totally unrelated to the incident under discussion here.

The record in this case fails to indicate that defendant had warned plaintiff that due to his condition he could not drink beer or other alcoholic spirits during plaintiff's convalescence. Further, unlike the previous inquiry about drinking, the discussion here was not concerning a fall that plaintiff had had, but rather, concerning plaintiff's changing of his own dressings on the surgical wound. We agree with plaintiff that the question was improper, and the objection should have been sustained and the answer stricken. Since the issue of contributory negligence is of great importance in this case, we cannot hold that the error here was harmless.

As a result of the errors discussed in this opinion, we are of the opinion that this case must be reversed and remanded for a new trial. While we express no opinion on the plaintiff's other allegations of error, we are confident that they will not occur on the retrial of this case.

The judgment of the circuit court of Kane County is reversed and the cause remanded for a new trial.

REVERSED and REMANDED

NASH and LINDBERG, *JJ.*, concur.